

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of August, two thousand and six.

PRESENT:

HON. RALPH K. WINTER,
HON. CHESTER J. STRAUB,
HON. ROBERT A. KATZMANN,
Circuit Judges.

Ardian Kacupaj,

Petitioner,

-v.-

No. 05-4294-ag
NAC

Alberto R. Gonzales, Attorney General,

Respondent.

FOR PETITIONER: Saul C. Brown, New York, New York.

FOR RESPONDENT: Stephen J. Murphy, United States Attorney for the Eastern District of Michigan, Susan El Gillooly, Assistant United States Attorney, Detroit, Michigan.

UPON DUE CONSIDERATION of this petition for review of a decision of the Board of Immigration Appeals ("BIA"), it is hereby ORDERED, ADJUDGED, AND DECREED, that the petition for review is GRANTED, the BIA's order is VACATED, and the case is REMANDED

1 to the BIA for further proceedings in accordance with this decision.

2 Ardian Kacupaj (A77-721-820), through counsel, petitions for review of a Board of
3 Immigration Appeals (“BIA”) decision in asylum-only proceedings that dismissed his appeal
4 from Immigration Judge (“IJ”) Michael W. Strauss's denial of asylum, withholding of removal,
5 and Convention Against Torture (“CAT”) relief. The BIA determined that, even assuming
6 credibility, fundamental changes in conditions in Albania were sufficient to rebut any
7 presumption of persecution. We assume the parties’ familiarity with the underlying facts and
8 procedural history.

9 We have jurisdiction here under 8 U.S.C. § 1252(a)(1). *See Kanacevic v. INS*, 448 F.3d
10 129, 134 (2d Cir. 2006). Under the regulations, the BIA does not have the authority to engage in
11 factfinding (except for taking administrative notice of commonly known facts). *See* 8 C.F.R. §
12 1003.1(d)(3)(i)(iv); *Xian Tuan Ye v. DHS*, 446 F.3d 289, 296 (2d Cir. 2006). Although Kacupaj
13 does not raise it in his brief, the critical issue in this case is whether the BIA did engage in fact-
14 finding in concluding that Kacupaj lacks a well-founded fear of persecution. We believe it did
15 and we will reach this issue, despite Kacupaj’s failure to raise it, in order to avoid manifest
16 injustice. *See, e.g., United States v. Babwah*, 972 F.2d 30, 34-35 (2d Cir. 1992).

17 Specifically, the BIA erred when it made an independent determination regarding
18 changed country conditions in Albania. That is, whereas the IJ found that Kacupaj failed to
19 establish eligibility for relief because he was incredible regarding the beatings he and his wife
20 suffered in 2000, the BIA assumed credibility but denied his claims because it found that, due to
21 fundamentally changed circumstances in Albania, Kacupaj no longer had a well-founded fear of
22 persecution. In reaching this determination, the BIA relied on the 2002 Country Report. The IJ

1 briefly discussed that report in his decision but made no findings based on it. The BIA also erred
2 when it made independent determinations regarding Kacupaj's eligibility for humanitarian relief
3 under 8 C.F.R. § 1208.13(b)(1)(iii)(A) and *Matter of Chen*, 20 I. & N. Dec. 16 (BIA 1989), and
4 under 8 C.F.R. § 1208.13(b)(1)(iii)(B) (an applicant may be granted asylum if “[t]he applicant
5 has established that there is a reasonable possibility that he or she may suffer other serious harm
6 upon removal to [the] country.”).

7 Upon remand, the agency may wish to consider the evidence on which the BIA relied, as
8 well as evidence of the return to power of the Democratic Party in Albania through general
9 elections in July 2005. *See Latifi v. Gonzales*, 430 F.3d 103, 106 n.1 (2d Cir. 2005). However, it
10 must remand to the IJ if it wishes to make findings based on this evidence. Since Kacupaj does
11 not raise his CAT claim in his brief to this Court, that claim is waived. *See Yueqing Zhang v.*
12 *Gonzales*, 426 F.3d 540, 542 n.1, 546 n.7 (2d Cir. 2005).

13 For the foregoing reasons, we GRANT the petition, VACATE the BIA’s decision, and
14 REMAND to the BIA for further proceedings consistent with this decision. Having completed
15 our review, Kacupaj’s pending motion for a stay of removal in this petition is DENIED as moot.

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18 FOR THE COURT:
19 Roseann B. MacKechnie, Clerk

20 By: _____
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